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Supreme Court, U.S.
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No. 96-1848

In The

Supreme Court of the United States

October Term, 1996

REGINA YODER and LESTER YODER,

Petitioners,

vs.

HONEYWELL INC., BULL HN INFORMATION SYSTEMS INC., formerly known as Honeywell Information Systems Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BULL HN INFORMATION SYSTEMS INC.

PASQUALE J. D'ORSI
HARE & CHAFFIN
101 Federal Street
Boston, Massachusetts 02110
(617) 330-5000

DANIEL F. WARDEN
Counsel of Record
BOND & MORRIS, P.C.
303 East 17th Avenue
Suite 888
Denver, Colorado 80203
(303) 837-9222

Attorneys for Respondent Bull HN Information Systems Inc.

71175 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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LIST OF INTERESTED PARTIES

Respondent Bull HN Information Systems Inc. ("Bull HN") is a wholly-owned subsidiary of Bull Data Systems Inc. which is owned by Compagnie des Machines Bull and Bull Data Systems N.V.

Although named in the caption, Honeywell Inc. is not an interested party. Pet. at ii.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Tenth Circuit Court of Appeals. The Tenth Circuit opinion is reported as 104 F.3d 1215 (10th Cir. 1997).

STATEMENT OF THE CASE

The "Statement of the Case" in Petitioners Regina and Lester Yoder's (the "Yoders") Brief sets forth the facts relevant to this petition with the following exceptions:

(i) The Yoders elected to file this action in New York and not Colorado, even though the Yoders have long resided in Colorado, Regina Yoder was employed in Colorado, and Regina Yoder was allegedly injured in Colorado.

(ii) The Yoders strongly resisted transferring the venue of this action to Colorado. *See* Order granting Defendants' Motion for Severance and Transfer at pp. 42-53 of the record designated by Honeywell before the Tenth Circuit.

(iii) The Yoders did not seek to add Bull HN as a defendant for over two years after the Complaint was filed. The Complaint was filed in December, 1992, and the Motion to Amend and add Bull HN was not filed until March, 1995.

(iv) The Tenth Circuit affirmed the district court's dismissal of the Yoders' claims despite the Yoders' pleas for equity:

> We are not unmindful that Plaintiffs now have no remedy. But if Plaintiffs had examined the keyboards before bringing suit, they would have noted that although the name "Honeywell" appeared on some, "Incoterm"

> or "Honeywell Systems Inc." also appeared on all but two of the keyboards, and those two referred to the same Puerto Rican place of manufacture as was on the keyboards containing Honeywell Systems Inc.'s name. *Prudence would dictate that Plaintiffs promptly investigate each of these entities as possible defendants.*

Pet. at 20a (emphasis added).

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO GROUNDS TO MERIT THE EXERCISE OF THE COURT'S DISCRETION IN GRANTING CERTIORARI.

None of the reasons for granting certiorari are present. The decision entered by the Tenth Circuit in this action is *not* in conflict with the decision of another United States Court of Appeal on the same matter. Petitioners have failed to cite *any* decisions in conflict with the Tenth Circuit. Nor did the Tenth Circuit depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court. Nor did the Tenth Circuit decide an important federal question in a way that conflicts with the relevant decisions of this Court. The Tenth Circuit instead applied the rules clearly established by this Court.

The Yoders contend that they have raised an important question of federal law that should be settled. The Yoders have wholly failed, however, to identify any evidence that the issue presented has any widespread significance. Nor have they

presented any evidence that the issue presented has been thoughtfully considered and explored by courts and commentators.

Not only does this issue fail to merit the exercise of the Court's discretion, it also lacks any significance for the parties in this case. The district court held that the Yoders' claims were barred by Colorado law. The Tenth Circuit ruled that the claims were barred by New York law. Even if the Tenth Circuit was wrong to apply New York law, the Yoders' claims are barred by Colorado law.

II.

THE TENTH CIRCUIT PROPERLY APPLIED LONGSTANDING PRECEDENT, INCLUDING THE RULE ESTABLISHED IN *VAN DUSEN v. BARRACK*, WHEN IT APPLIED THE LAW OF THE TRANSFEROR COURT TO PLAINTIFFS' CLAIMS.

The Yoders' argument, if accepted, would require the Court to reverse the longstanding rule adopted in *Van Dusen v. Barrack*, 376 U.S. 612 (1964). In the thirty years since the decision in *Van Dusen*, it has been well accepted that when an action is transferred, at the request of a defendant, pursuant to 28 U.S.C. § 1404, the law of the transferor court should be applied to the action by the transferee court. In *Van Dusen*, the Court reasoned that the history and purpose of Section 1404(a) indicated that it should be regarded as a "federal judicial housekeeping measure" and that the statute simply "authorized the change of courtrooms" and not a change in the law applicable to any case. 376 U.S. at 636-37.

The Yoders' argument also would require the Court to ignore its interpretation of Section 1404 as expressed in *Ferens v. John*

Deere Co., 494 U.S. 516 (1990) that Section 1404 be construed in a uniform and predictable manner. In *Ferens*, the Court concluded that the *Van Dusen* rule should apply not only when the defendant initiated the transfer pursuant to Section 1404, but also when the plaintiff initiated the transfer, even though different policy considerations were implicated when a plaintiff sought the transfer.

One factor that weighed heavily in favor of adoption of the *Van Dusen* rule in *Ferens* was the Court's desire to establish a "bright line" rule: "[f]oresight and judicial economy now seem to favor the simple rule that the law does not change following a transfer of venue under § 1404(a)". 494 U.S. at 530. In *Ferens*, the Court reasoned that if the Court were to adopt a rule that the law of the transferee court would apply when the transfer was initiated by the plaintiff, that rule would leave "unclear" many situations, including which law should apply when both a defendant and a plaintiff move for a transfer of venue or when the court transfers venue on its own motion. The specter of these unresolved situations, as well as the Court's "duty in deciding [cases], to consider whether our decision will create litigation and uncertainty", motivated the Court to adopt the *Van Dusen* rule for plaintiff-initiated transfers. 494 U.S. at 531.

Adopting the Yoders' argument would violate the "bright line" established in *Ferens* and create litigation and uncertainty. Such a decision would leave unresolved instances where a motion to amend was filed prior to the transfer, but decided after; instances where there were amendments to claims or the addition of new claims; instances where a counterclaim was added or amended after the action was transferred; and similar situations.

As the Court in *Ferens* stated, there were three independent reasons for the decision in *Van Dusen:* The *Erie* Doctrine; forum shopping; and considerations of convenience. *Ferens*, 494 U.S.

at 523. Each of the three reasons for the decision in *Van Dusen* supports the Tenth Circuit's decision to apply the law of New York, or the transferor court, to the Yoders' claims against Bull HN.

A. The *Erie* Doctrine

First, the *Erie* Doctrine, adopted in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), supported the application of the law of the transferor court in *Van Dusen* when a case was transferred on the motion of the defendant. The essence of the *Erie* Doctrine is that "for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Van Dusen*, 376 U.S. at 638, quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). The *Erie* Doctrine, when applied to Section 1404, ensures that "the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen*, 376 U.S. at 638.

The *Erie* Doctrine similarly supports the decision of the Tenth Circuit in this action to apply the law of the transferor court to the claims against the subsequently added Defendant Bull HN. If this action had been filed in New York state court (as it would have been absent diversity jurisdiction), New York law (including its choice of law provisions) would have applied to the claims against any added defendant, because the New York courts would not have had the power to "transfer" the case to Colorado. Applying Colorado law to the Yoders' claims against Bull would mean that diversity jurisdiction had allowed one party to achieve a result that could never have been achieved in New York — that is, the application of Colorado law.

Most plaintiffs, unlike the Yoders, would be prejudiced by the rule now being advanced by the Yoders. Plaintiffs often have wide discretion on where to file their action. That discretion can be advantageous because it allows the plaintiff to select the law applicable to his claims (subject to each state's conflict of law rules). This advantage is not insubstantial. For example, if a plaintiff filed suit against a single defendant but with an expectation that through discovery or otherwise it would need to name additional defendants (*e.g.* as possible manufacturers of the product that caused the damages), plaintiff would be denied the benefits of selecting the transferor court if the law of the transferee court was applied to the subsequently added defendants. In effect, the Yoders' argument, if accepted, would contradict and overrule the reasoning in *Ferens* that Section 1404 "should not deprive parties of state-law advantages that exist absent diversity jurisdiction." *Ferens*, 494 U.S. at 523.

Despite the clarity of the *Erie* Rule and its application to Section 1404, the Yoders argue that the *Erie* Rule supports the application of Colorado law. The Yoders argue that the Tenth Circuit decision to apply New York law has prejudiced their claims because they selected "as their forum against Bull HN, the District of Colorado". Pet. at 6. This argument should be rejected because it makes erroneous factual and legal assumptions. The Yoders never "selected" the District of Colorado. In fact, the Yoders vigorously fought the transfer of this action from New York to Colorado. The Yoders instead selected New York when they initially filed this action.

Nonetheless, even if the Yoders had initiated the transfer of this action from New York to Colorado, the distinction would not be significant. In *Ferens*, this Court ruled that the law of the transferor court should be applied even in instances where the plaintiff causes the transfer. The Yoders would argue that their situation is different, however, because they did not seek to add Bull HN until after this action was pending in Colorado.

This distinction is also insignificant, and the Yoders have failed to cite a single decision or even a law review article that suggests that the timing of a motion to amend is relevant to an analysis under *Van Dusen*. The timing of a motion to amend is rarely a strategic decision in litigation, and it certainly was not in this case. For example, the Yoders failed to name Bull HN while this action was pending in New York not because they were making a strategic decision and were waiting for the motion for change of venue to be brought, but because they failed to do the necessary and obvious investigation of the proper parties earlier. The Yoders would have filed their motion to amend and added Bull HN in New York if they had properly followed up on the identification of the manufacturer. The applicable law should not be determined by when a plaintiff chooses to add a defendant.

B. Forum Shopping

Second, the Court in *Van Dusen* was also concerned about fashioning a rule that would not create opportunities for forum shopping. This concern also supports the Tenth Circuit's decision to apply the law of the transferor court to the claims asserted against parties added after a transfer. This concern about forum shopping must be tempered by the recognition that "a plaintiff already has the option of shopping for a forum with the most favorable law." *Ferens*, 494 U.S. at 527. "Diversity jurisdiction did not eliminate these forum shopping opportunities; instead, under *Erie*, the federal courts had to replicate them." *Ferens*, 494 U.S. at 527.

The Yoders engaged in forum shopping when they filed this action in New York. Applying New York law, as the Tenth Circuit did, "would not give a plaintiff an opportunity to use a transfer to obtain a law that he could not obtain through his initial forum selection." *Ferens*, 494 U.S. at 528. Applying Colorado law, however, would give the defendant an opportunity to engage in

forum shopping because the defendant could alter the law applicable to claims in the lawsuit by causing the transfer.

C. Convenience

Third, *Van Dusen* also made clear that the decision to transfer venue under Section 1404 should turn on "considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law."[1] *Ferens*, 494 U.S. at 528. If the law were to change following a transfer, a district court "would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum." *Van Dusen*, 376 U.S. at 636. Before making a transfer, a district court might have to undertake an analysis of the applicable law in the transferee jurisdiction to determine whether the plaintiff would be prejudiced. This analysis would inevitably distract the court from the considerations of convenience — not only for the parties, but also for witnesses and others — that are the basis for Section 1404.

Just as in *Van Dusen* and in *Ferens*, the need to focus on considerations of convenience supports the application of the law of the transferor court to the claims asserted against a defendant added after a transfer. If the law of the transferee court were applicable to subsequently added defendants, a district court, faced with a motion to transfer, might have to consider whether any defendants might be added, and whether the law of the transferee court would be advantageous to the

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1. The plain language of Section 1404 mandates that issues of convenience (for parties and witnesses) be the sole factor considered. Section 1404 refers only to "the convenience of parties and witnesses in the interest of justice."

defendants or the plaintiffs. These considerations are irrelevant to the considerations of convenience that are the primary purpose of Section 1404.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL F. WARDEN
Counsel of Record
BOND & MORRIS, P.C.
303 East 17th Avenue
Suite 888
Denver, Colorado 80203
(303) 837-9222

PASQUALE J. D'ORSI
HARE & CHAFFIN
101 Federal Street
Boston, Massachusetts 02110
(617) 330-5000

Attorneys for Respondent
Bull HN Information Systems Inc.